

UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

\* \* \*

**FRANK MACIAS,**

**Petitioner,**

Case No. 3:15-cv-00461-RCJ-VPC

## ORDER

v.

RENEE BAKER, et al.,

## Respondents.

This *pro se* habeas matter under 28 U.S.C. § 2254 comes before the court on respondents' motion to dismiss the unexhausted petition (ECF No. 10). In response to the motion to dismiss, petitioner Frank Macias filed a motion for stay and abeyance in accordance with *Rhines v. Weber* pending the conclusion of his state postconviction proceedings (ECF No. 12). Respondents opposed the motion for stay (ECF No. 14).

## I. Procedural History and Background

On August 5, 2008, a jury convicted Macias of count 1: robbery with the use of a deadly weapon; count 2: attempt murder with use of a deadly weapon; and count 3: possession of a firearm by ex-felon (exhibit 4).<sup>1</sup> The state district court sentenced him as follows: counts 1 and 2 – two terms of 72 to 180 months, each with an equal and consecutive term for the deadly weapon enhancement; count 2 consecutive to count 1; count 3 – 13 to 60 months, concurrent with counts 1 and 2; with 543 days credit for time

<sup>1</sup> Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 10, and are found at ECF No. 11.

1 served. *Id.* The Nevada Supreme Court affirmed the convictions on November 4, 2009.  
2 Exh. 6.

3 On January 19, 2010, Macias filed a *pro se* state postconviction habeas corpus  
4 petition. Exh. 7. The state district court appointed counsel, and Macias filed a  
5 counseled, second postconviction petition. Exh. 9. The State filed a response to the  
6 petition. Instead of issuing a decision, on July 31, 2012, the state district court issued  
7 an order to statistically close the case incorrectly stating the matter was resolved  
8 pursuant to a guilty plea. Exh.10.

9 No action was taken on Macias' post-conviction petitions until he resubmitted his  
10 initial *pro se* petition again with the state district court on July 10, 2013. Exh. 11. The  
11 State again filed a response, and on November 4, 2013, the district court issued an  
12 order denying "Defendant's Third Petition on the merits (referring to Macias' *pro se*  
13 petition filed on July 10, 2013). Exh. 12.

14 Macias timely appealed through counsel, arguing: "This case should be  
15 remanded in order for the District Court to make a ruling on all issues raised by Defense  
16 Counsel in Defendant's Second Petition." On September 18, 2014, the Nevada  
17 Supreme Court dismissed the appeal, stating:

18 The district court order denying Macias' petition failed to address the  
19 claims raised in the petition filed on October 13, 2011, by his counsel,  
20 Brett Whipple. Because the district court order does not resolve all of the  
21 claims raised below, it is not a final order. Therefore, we lack jurisdiction  
over this appeal . . . .

22 Exh. 14 (Nevada Supreme Court Case No. 64466). Remittitur issued October  
23 22, 2014. Exh.15.

24 Next, Macias dispatched his federal habeas petition for filing on September 3,  
25 2015 (ECF No. 6). Then, on September 30, 2015, Macias initiated continued state  
26 postconviction proceedings by filing a *pro se*, fourth postconviction petition alleging a  
27 double jeopardy violation of the Fifth and Eighth Amendments. Exh. 16. The State filed  
28 a response requesting the district court to "address the concerns outlined in the Nevada

1 Supreme Court's September 18, 2014 Order Dismissing Appeal." Exh. 17 (arguing that  
2 the state district court should deny all claims in Macias' January 19, 2010, October 13,  
3 2011, and July 10, 2013 petitions). As to the claims in Macias' fourth postconviction  
4 petition, the State argued that the petition was time-barred, barred by laches and/or was  
5 successive and waived. *Id.*

6 On May 2, 2016, Macias' postconviction counsel filed a supplemental brief  
7 addressing the "unresolved claims from [the] October 13, 2011 petition." Exh. 9. At the  
8 time respondents filed their motion to dismiss Macias' federal petition, the state  
9 postconviction petition was briefed and ready for disposition by the state district court.  
10 See exh. 1. This court may take judicial notice of the Nevada Supreme Court docket,  
11 and it appears that Macias' appeal of the denial of his state postconviction petition is  
12 currently before the Nevada Supreme Court. Case No. 71475.

13 **II. Legal Standards & Analysis**

14 Exhaustion of state remedies is a prerequisite to a federal court's consideration  
15 of claims presented in a petition for writ of habeas corpus. 28 U.S.C. 2254(b). The  
16 exhaustion doctrine is based on a policy of federal-state comity designed to give state  
17 courts the initial opportunity to correct alleged constitutional deprivations. See *Picard v.*  
18 *Conner*, 404 U.S. 270, 275 (1971). It requires the habeas petitioner to "fairly present"  
19 the "substance" of his federal habeas corpus claim to the state courts. *Anderson v.*  
20 *Harless*, 459 U.S. 4, 6 (1982). The "fair presentation" requirement is only satisfied when  
21 the claim has been presented to the highest state court by describing the operative facts  
22 and legal theory upon which the federal claim is based. *Anderson*, 459 U.S. at 6;  
23 *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982).

24 In his motion for stay and abeyance, Macias acknowledges that his federal  
25 petition is unexhausted (ECF No. 12). Macias explains that in the midst of the  
26 confusion of the errors in the state district court, and as it was unclear whether the state  
27

1 courts were going to consider his state postconviction claims on the merits at all,  
 2 counsel advised him that he should proceed with filing a federal habeas petition.  
 3

4 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations  
 5 upon the discretion of the court to facilitate habeas petitioners' return to state court to  
 6 exhaust claims. The *Rhines* Court stated:

7 [S]tay and abeyance should be available only in limited  
 8 circumstances. Because granting a stay effectively excuses a petitioner's  
 9 failure to present his claims first to the state courts, stay and abeyance is  
 10 only appropriate when the district court determines there was good cause  
 11 for the petitioner's failure to exhaust his claims first in state court.  
 12 Moreover, even if a petitioner had good cause for that failure, the district  
 13 court would abuse its discretion if it were to grant him a stay when his  
 14 unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An  
 15 application for a writ of habeas corpus may be denied on the merits,  
 16 notwithstanding the failure of the applicant to exhaust the remedies  
 17 available in the courts of the State").

18 *Rhines*, 544 U.S. at 277.

19 The Court went on to state that, "[I]t likely would be an abuse of discretion for a  
 20 district court to deny a stay and to dismiss a mixed petition if the petitioner had good  
 21 cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and  
 22 there is no indication that the petitioner engaged in intentionally dilatory litigation  
 23 tactics." *Id.* at 278.

24 Thus, this court may stay a petition containing both exhausted and unexhausted  
 25 claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are  
 26 potentially meritorious; and (3) petitioner has not engaged in dilatory litigation tactics.

27 *Rhines*, 544 U.S. at 277; *Gonzalez v. Wong*, 667 F.3d 965, 977–80 (9th Cir. 2011).  
 28 "[G]ood cause turns on whether the petitioner can set forth a reasonable excuse,  
 29 supported by sufficient evidence, to justify [the failure to exhaust a claim in state court]." *Blake v. Baker*, 745 F.3d 977, 982 (9th Cir. 2014). "While a bald assertion cannot  
 30 amount to a showing of good cause, a reasonable excuse, supported by evidence to  
 31 justify a petitioner's failure to exhaust, will." *Id.* An indication that the standard is not  
 32 particularly stringent can be found in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), where

1 the Supreme Court stated that: “[a] petitioner’s reasonable confusion about whether a  
2 state filing would be timely will ordinarily constitute ‘good cause’ to excuse his failure to  
3 exhaust.” *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278). See also *Jackson v.*  
4 *Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005) (the application of an “extraordinary  
5 circumstances” standard does not comport with the “good cause” standard prescribed  
6 by *Rhines*).

7 Here, if anything is clear in the procedural history of Macias’ state-court litigation,  
8 it is that Macias can demonstrate reasonable confusion about whether his state filing or  
9 filings would be deemed timely. This court rejects respondents’ argument that granting  
10 a stay under these particular circumstances would render orders to stay and abey  
11 routine, in contravention of the purposes of the Antiterrorism and Effective Death  
12 Penalty Act (AEDPA). Accordingly, petitioner’s motion for a stay and abeyance of this  
13 federal habeas corpus proceeding is granted. Macias will need to file a motion to re-  
14 open the case after his state postconviction proceedings have concluded. In light of the  
15 stay, respondents’ motion to dismiss shall be denied without prejudice.

16       **III. Conclusion**

17       **IT IS THEREFORE ORDERED** that petitioner’s motion for stay and abeyance  
18 (ECF No. 12) is **GRANTED**.

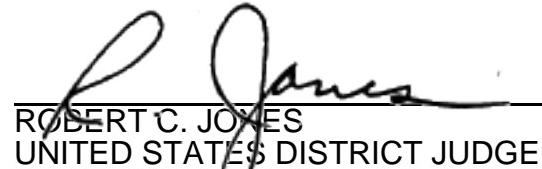
19       **IT IS FURTHER ORDERED** that this action is **STAYED** pending final resolution of  
20 petitioner’s state proceedings.

21       **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon petitioner  
22 returning to federal court with a motion to reopen the case within **forty-five (45) days** of  
23 the issuance of the remittitur by the Supreme Court of Nevada, at the conclusion of any  
24 state court proceedings.

1           **IT IS FURTHER ORDERED** that respondents' motion to dismiss (ECF No. 10) is  
2           **DENIED** without prejudice.

3           **IT IS FURTHER ORDERED** that the Clerk **SHALL ADMINISTRATIVELY CLOSE**  
4           this action, until such time as the court grants a motion to reopen the matter.

5  
6           DATED: This 6<sup>th</sup> day of March, 2017.

7  
8             
9           ROBERT C. JONES  
10           UNITED STATES DISTRICT JUDGE